

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

COURT OF APPEALS
DIVISION TWO

2020 APR 17 PM 1:28

STATE OF WASHINGTON)
v.)
Respondent,)
Antoine J. Perry _____)
(your name))
Appellant.)

No. 54165 - 3 IT

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

I, Antoine Perry, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

Prosecutor Misconduct and Material witness
State v. Williams, 18 Wash 47, 50 P. 580 1897 Wash LWS
(03) 1897

Additional Ground 2

Ineffective Assign Counsel Jones v. Wood, 114
F.3d 1002 (9th Cir. 1997)

If there are additional grounds, a brief summary is attached to this statement.

Date: _____

Signature: _____

FILED
COURT OF APPEALS
DIVISION I

2020 APR 17 PM 1:28

S-17-1-01750-9
BY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

ANTOINE Joseph Perry,

Defendant.

No. 17-1-01750-9

MOTION TO ARREST The
JUDGMENT Pursuant To CrR
7.4 and FOR NEW TRIAL
Pursuant To CrR 7.5

MOTION

COMES Now: The defendant, Antoine Perry, and hereby MOVES this Honorable Court to; Arrest the Judgment and/or Order an New Trial, pursuant to CrR 7.4 and CrR 7.5. The Facts and Law to support the above-entitled authorities are set forth herein.

STATEMENT OF FACTS

I, Antoine Perry declare under penalty and perjury under the laws of the State of Washington that the foregoing is true and Correct. (RCW 9A.72.085)

On May 03, 2018, Mr. Perry was transported from Thurston County to Pierce County Jail to face several Criminal allegations that stem from an allegation that occurred several months prior.

DEFENDANT'S MOTION

1 On May 5, 2018, Mr. Perry was arraigned in Pierce
2 County Superior Court for the following criminal offenses
3 Count (1): Rape in the Second degree; Count (2): Assault
4 in the Second degree; and Count (3): Unlawful
5 Imprisonment, each criminal allegation attached with
6 crime aggravators pursuant to RCW 9.94A.535(3)(F);
9.94A.533, and invoking the provisions of 9.94A.835
(finding of sexual motivation). The three criminal
offenses were assigned to Judge Jerry Costello

7 On July 18, 2019, both legal parties did opening
8 statements, and the trial lasted until July 25, 2019.
9 The jury went into deliberations and were presented
10 with several jury instructions, however, the
prosecution has now been found to have committed
11 Constitutional error, and permitted the jury to
accept and create a decision contrary to law on
12 Count (2): Assault in the Second degree; and Count (3)
Unlawful Imprisonment, which Mr. Perry's indictment
and information does not charge a crime, and
14 prevents the jury from sufficiently finding proof
15 of an "Material Element" which is required to
legally find Mr. Perry guilty of the offense.

17 7-29-19 Tacoma WA

Antoine Perry
NAME

18 DATE AND PLACE

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PAGE OF

LAW AND ARGUMENT

The United States Constitution Amendment (6) provides in part: "In all criminal prosecutions, the accused shall... be informed of the nature and cause of the accusation; . . ." Our State Constitution article 1 § 22; (amend 10) provides that in criminal prosecutions that accused shall have the right . . . to demand the nature and cause of the criminal charge he or she, is to meet at trial and cannot be tried for an offense which has not been charged. *State v. Vangerpen*, 125 Wn.2d 782 (1995).

Washington Courts have repeatedly and recently insisted that a charging document is constitutionally adequate only if all essential elements of a crime, statutory and nonstatutory, are included in the document so as to apprise the accused of the charges against him or her and to allow the defendant to adequately prepare a defense. *Auburn v. Brooke*, 119 Wn.2d 623, 627, 836 P.2d 212 (1992); *State v. Irizarry*, 111 Wn.2d 591, 592, 763 P.2d 432 (1988).

All essential elements of an alleged crime must be included in the charging document in order to afford the accused of the particular facts. *State v. Kjorsvik*, 117 Wn.2d 93, 105, 812 P.2d 86 (1991). This Court should examine the documents of (this matter), to determine if there is any fair construction by which the elements are all contained in the document." *State v. Hopper*, 118 Wn.2d 151, 155-56, 822 P.2d 775 (1992) (citing *State v. Kjorsvik*, 117 Wn.2d 93, 105, 812 P.2d 86 (1991)).

While the legislative generally defines the elements of a crime, not every clause in every statute in title 9A RCW creates an "essential element" of a crime. The essential element rule" has long been settled law in Washington and is based on the federal and state constitutions, and on court rule. *Leonard v. Territory*, 2 Wash. Terr. 381, 7 P. 872 (1885); *Brook*, 119 Wn.2d at 627. An essential element is one whose specification is necessary to establish the very illegality of the behavior charged. *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013) (internal quotation marks omitted) (quoting *State v. Ward*, 148 Wn.2d 803, 811, 64 P.3d 640 (2003)). A fact can also become an element of the crime because of the consequences of its proof." Any facts that increase the prescribed range of penalties to which a criminal defendant

1 is exposed' are elements of the crime." (except prior
2 convictions under some circumstances). *Alleyn v. United*
3 *States*, — U.S. —, 133 S. Ct. 2151, 2161, 186 L.Ed.2d 314
4 (2013) (*Apprendi v. New Jersey*, 530 U.S. 466, 476, 120
5 S.Ct. 2348, 147 L.Ed.2d 435 (2000)); *Descamps v.*
6 *United States*, — U.S. —, 133 S. Ct. 2276, 2288, 184 L.Ed.
7 438 (2013) (quoting *Apprendi*, 530 U.S. at 490); *Jones v.*
8 *United States*, 526 U.S. 227, 243, n.6, 119 S. Ct. 1215, 143
9 L.Ed.2d 311 (1999); This is not an exhaustive list. See
10 generally, *State v. Tinker*, 155 Wn.2d 219, 221, 118 P.3d
11 885 (2005).

12 Here, Mr. Perry claims the indictment and information
13 is insufficient and does not charge a crime, pursuant to
14 CrR 2.1; and does not sufficiently provide notice of the
15 material elements in the indictment for the criminal
16 offense of Second degree Assault, RCW 9A.36.021;
17 CrR 7.4(2)(b).

18 Under CrR 2.1(a)(2) states in pertinent part:
19 "The indictment or information shall be plain, concise and
20 definite written statement of essential facts constituting
21 the offense charged.... The indictment or information
22 shall state for each count the official or customary
23 citation of the statute, rule, regulation or other
24 provisions of law which the defendant is alleged
25 therein to have violated."

26 In Perry's indictment and information, the State shall
27 not dispute that the entire indictment and information
28 is relevant to each offense, in the indictment each
offense alleged is different, holding its own essential
elements and each element in each offense, contains
the requirement to state all "MATERIAL ELEMENTS" that
the State holds burden to prove beyond a reasonable
doubt. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d
368 (1970).

A material element is considered a victim's name, alleging
the specific offense (9A.36.021) an accuser's name must
be written in the indictment, to inform the accused
of the nature of what he or she must face, in complete
U.S. Const. Amendment 6; Wash. State Const. Amend. 1 § 22.
It also provides the accused, with direct knowledge
of the specific illegality of behavior charged.
Zillyette, 178 Wn.2d, 153, 158, 307 P.3d 712 (2013).

1 However, to entertain the jury instructions properly instructed
2 the jury of an accuser's name, the Court shall, not
3 consider this over Mr. Perry's Constitutional rights,
4 additionally, because proper jury instructions
5 cannot cure a defective indictment and information
that does not pass constitutional muster, CrR 2.1.
Jury instructions and charging documents serve
different functions.

6 IF Mr. Perry is not properly charged with an crime,
7 in (Count Two) Second degree Assault, due to there being
8 no proof of material elements, then the indictment
and information cannot stand, and has failed to
9 sufficiently charge, Mr. Perry with an criminal
offense, which is an error in law, and should
require this Court to set aside the verdict in this
matter on Count Two, Second Degree Assault, pursuant
to CrR 7.4(a)(3). The assumption of whom, the victim
maybe is unconstitutional and violates Perry's
constitutional rights under United States Constitution
Amendment 6, and the State's Constitution Art. I §
22; because Perry must receive notice that apprises
in complete, and plain language of each offense and
each essential element, CrR 2.1(a)(1). Therefore,
Perry has been misled to his own prejudice.

17
18 2. Should Mr. Perry receive a New Trial
pursuant to CrR 7.5?

19 A CrR 7.5 motion may be granted for specifically
20 enumerated bases, which are entirely different than
the jurisdictional and sufficiency challenges at issue
21 in a CrR 7.4 motion. Grounds for a new trial include
22 under CrR 7.5 include:

- 23 (1) Receipt by the jury for any evidence, paper, document
or book not allowed by the court;
- 24 (2) Misconduct of the prosecution or jury;
- 25 (3) Newly discovered evidence material for the defendant,
which the defendant could not have discovered with
reasonable diligence and produced at the trial;

- (4) Accident or Surprise;
- (5) Irregularity in the proceedings of the Court jury or prosecution, or any order of court, or abuse of discretion, by which the defendant was prevented from having a fair trial;
- (6) Error of law occurring at the trial and objected to at the time by the defendant;
- (7) That the verdict or decision is contrary to law and the evidence;
- (8) That substantial justice has not been done. CrR 7.5

Mr. Perry moves this honorable court for a New Trial under CrR 7.5(5)(7) and (8).

A. The original distinction between "sentencing factors" and "Elements" for double jeopardy purposes paralleled the distinction between sentencing factors and elements for jury trial purposes.

"A criminal offence' is composed of 'elements', which are factual components that must be proved by the State beyond a reasonable doubt and submitted (if the defendant so desires) to a jury." Monge v. California, 524 U.S. 721, 737 118 S.Ct. 2246, 144 L.Ed.2d 615 (1998). Under traditional principles of Anglo-American criminal law, the elements of an offense were defined in the same way for all constitutional purposes, including both the Fifth Amendment's prohibition on double jeopardy and the Sixth Amendment's right to a jury trial. *Id.* at 737-38. However, the question of how to define the elements of an offense has generated a number of divided opinions from the United States Supreme Court over the last several decades. *Alleyne*, 570 U.S. at 105. "The principal source of disagreement is the constitutional status of a special sort of facts known as a 'sentencing factor'." *Id.*

The term "sentencing factor" was first used by the United States Supreme Court in *McMillan v. Pennsylvania*, 477 U.S. 79, 86, 106 S. Ct. 2411, 91 L.Ed.2d 67 (1986), "to refer to facts that are not found by a jury but that can still increase the defendant's punishment." *Alleyne*, 570 U.S. at 105.

The Court held that state legislatures may define facts as sentencing factors, rather than elements, and further may provide that sentencing factors can be proved to a judge by a preponderance of the evidence, rather than being proved to a jury beyond a reasonable doubt. McMillian, 477 U.S. at 86, 91. In doing so, however, the Court did not "budge from the position that (1) constitutional limits exist to States' authority to define away facts necessary to constitute a criminal offense, and (2) that a state scheme that keeps from the jury facts that 'expose [defendants] to greater or additional punishment' may raise serious constitutional concern". Apprendi v. New Jersey, 530 U.S. 466, 486, 120 S. Ct. 2348, 147 L.Ed. 2d 435 (2000) (alterations in original) (citations omitted) (quoting McMillian, 477 U.S. at 85-88).

The difference between "elements" and "sentencing factors" was first set forth in McMillian, a case concerning the right to a jury trial. Whether a particular fact is treated as an element or as a sentencing factor is also critical for double jeopardy purposes because "[t]he Court generally concluded... that the Double Jeopardy Clause imposes no absolute prohibition against the imposition of a harsher sentence at retrial after a defendant has succeeded in having his original conviction set aside." Bullington v. Missouri, 451 U.S. 430, 438, 101 S. Ct. 1852, 68 L.Ed. 2d 270 (1981). One of the reasons, is because outside of the death penalty context, the double jeopardy clause applies only to offenses, not sentences. *Id.* Thus, unlike elements of an offense, sentencing factors (and sentences themselves) are generally not subject to the Fifth Amendment's double jeopardy clause.

In Bullington, the United States Supreme Court "established a narrow exception" to the general rule" for the sentencing phase of capital murder trials. Monge, 524 U.S. at 730. The Court reasoned that unlike a typical sentencing hearing, the sentencing phase of a capital murder trial had "the hallmarks of the trial on guilt or innocence." Bullington, 451 U.S. at 439.

That is, rather than evidence being presented informally to a judge who has discretion to select a sentence from a wide range authorized by statute, there was an adversarial process that presented evidence to a jury, which was charged with making a binary choice based on proof beyond a reasonable doubt, *Id.* at 438.

Later, in *Monge*, the United States Supreme Court declined to apply *Bullington* to proof of prior conviction in a noncapital case, even if similar sentencing procedures were used, 524 U.S. at 724-25. The Court determined that double jeopardy protections did not apply in that context because unlike in a capital case, the trial-like sentencing procedures used to prove prior convictions at issue in *Monge* were a matter of "Legislative grace, not constitutional command." *Id.* at 734. Thus, whether a fact could be treated as a sentencing factor for double jeopardy purposes was directly linked to the question of whether that fact is constitutionally required to be treated as an element for jury trial purposes.

It remains true that proof of a prior conviction does not require trial-like procedures or proof beyond a reasonable doubt, *Alleyne*, 570 U.S. at 111 n.1.. However, that is not the case for aggravating circumstances like those at issue here, in Mr. Perry's matter. As discussed below, full jury trial procedures for RCW 9.94A.535(3)(f); RCW 9.94A.533; RCW 9.94A.835... aggravating circumstances are no longer a matter of Legislative grace, They are now a Constitutional Command.

B. Constitutional limits on "Sentencing factors" for Sixth Amendment purposes have been refined over time.

As noted above, state legislatures' authority to distinguish sentencing factors from elements for Sixth Amendment purposes is subject to constitutional limitations, *McMillan*, 477 U.S. at 86, 91. The United States Supreme Court first addressed what these limitations are in Apprendi, 530 U.S. 466. The Court has since clarified and refined its holdings, ultimately reaching the conclusion that a fact other than a prior

Conviction "that, by law, increases the penalty for a crime is an "element" that must be submitted to the jury and found beyond a reasonable doubt." Alleyne, 570 U.S. at 103. Because an understanding of the way in which Sixth Amendment constitutional law has developed is necessary for our double jeopardy analysis, to be used briefly, and this honorable Pierce County Superior Court, shall observe the line of cases leading up to the Supreme Courts decision in Alleyne.

For purpose to foreclose the State's objections, The first such case Apprendi, concerned New Jersey's hate crimes statute, which increased the maximum sentence for a crime if a judge found by a preponderance of the evidence that the crime was committed "with a purpose to intimidate an individual or group of individual's because of race, color, gender, handicap, religion, sexual orientation or ethnicity." 530 U.S. at 469 (quoting former N.J. Stat. Ann. § 2C:44-3(e) (1995)). Analyzing the common law history of which facts must be proved to a jury, the United States Supreme Court determined that there was no "principled basis" for treating a fact that increases the maximum authorized term of imprisonment differently from the elements constituting the base offense. Id. at 476. In so ruling, the Court reasoned that "when the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." Id. at 494 n.19 (emphasis added). Therefore, it must be submitted to a jury and proven beyond a reasonable doubt.

The line of cases that followed Apprendi applied its rule in a number of other contexts. See Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) (capital punishment); Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (state sentencing guidelines); United States v. Booker, 543 U.S. 220, 125, S. Ct. 738, 160 L. Ed. 2d 621 (2005) (federal sentencing guidelines); S. Union Co. v. United States, 567 U.S. 343, 132 S. Ct. 2344, 183 L. Ed. 2d 318 (2012) (criminal fines). However, state legislatures retained the authority to classify facts as sentencing factors if they increased only the minimum penalty, rather than the maximum.

penalty. Harris, 536 U.S. at 550. Such sentencing factors could still be found by a judge by a preponderance of the evidence. Id.

This changed with the Supreme Court's holding in Alleyne, which overruled Harris and held that "there is no basis in principle or logic to distinguish facts that raise the maximum from those that increase the minimum." 570 U.S. at 116. Alleyne also did away with Apprendi's "functional equivalent" language. "The essential point is that the aggravating fact produced a higher range, which, in turn, conclusively indicates that the fact is an element of a distinct and aggravated crime. It must, therefore, be submitted to the jury and found beyond a reasonable doubt." Id. at 115-16 (emphasis added).

Thus, a "sentencing factor" is defined as a fact that can increase the sentence for a crime but does not need to be proved to a jury beyond a reasonable doubt, such as proof of a prior conviction. Over time, the United States Supreme Court has substantially limited the types of facts that may be designated as sentencing factors for purpose of Sixth Amendment's jury-trial right. In accordance with Alleyne, the legislature's designation of a fact as a sentencing factor no longer controls.

Now, a fact other than proof of a prior conviction that increases the minimum penalty authorized by law must be treated as an element, not a sentencing factor, for Sixth Amendment purposes. It is clear that the RCW 9.94A.535; RCW 9.94A.533; and RCW 9.94A.835, aggravating circumstances are elements for Sixth Amendment purposes, because they are not limited to proof of a prior conviction and, by law, they increase the minimum penalty for Second degree Assault RCW 9A.36.021.

Here, in Mr. Perry's matter, under CrR 7.5(7) the Verdict and decision is contrary to law, because in order for Perry to receive a decision and verdict worthy of confidence the jury, as a matter of law, must be submitted jury instruction that sufficiently charge the defendant incomplete.

The jury cannot make a decision and return a special verdict on facts that don't exist; the jury can only make a decision on criminal charges that are sufficient and apprise the accused of the nature and cause of the criminal charge, he or she, is to meet at trial and cannot be tried nor judged for an offense, in which has not been charged. State v. Vangerpen, 125 Wn.2d 782 (1995); CrR 2.1(a)(1); U.S. Const. Amend 6; Wash. Const. Art. I § 22 (see state and Constitution law)

Second degree Assault, RCW 9A.36.021, as a matter of legislative requirement, also, requires "another person" commonly referred to in statute, which means the "act" must constitute illegal means against "another" by some sort of action defined in the subsections, under RCW 9A.36.021, Second degree Assault. However, because the indictment and information is insufficient pursuant to CrR 2.1, the jury shall not be allowed to determine all charges collectively, this within its own action deprives Perry of a fundamentally fair proceeding. U.S. Const. Amend. 14, and before the tier of fact, can reach an verdict on an "special verdict" aggravating circumstance element, it's highly and constitutionally required that, the jury be legally informed properly. Jury Instructions and indictment and information, CrR 2.1, serve different functions, so it is not legally possible for jury instructions to cure a defective indictment.

Additionally, there irregularity in the proceedings prohibit substantial justice to be served, in light of Perry, also jeopardy can not attach to information or evidence, if he is not properly charged, as it would, prohibit successive prosecutions for an other offense. U.S. Const. Amend. V; Wash. Const. Art. I § 9; Bravo - Fernandez v. United States, ___ U.S. ___, 137 S. Ct. 352, 357, 196 L.Ed.2d 242 (2016); State v. Guzman Nunez, 174 Wn.2d 707, 717 n.4, 285 P.3d 81 (2012).

For the above reasons and facts of law herein, the Court should grant, Mr. Perry's CrR 7.4 motion, and rule then Grant, Mr. Perry's CrR 7.5 motion, as justice has not been meet, in light of Mr. Perry and the state.

Signed on this 29 day of July, 2019

Dear, Mr Sepe

- 1.) I wrote Karla Thomas Judge Jerry Constello's official court reporter asking her for my trial transcripts. By any chance was you contacted about that request your client Antoine Perny had made?
- 2.) Did Mr. Scott Harless or the prosecuting Attorney office ever inform you that I Antoine Perny sent a Public Records Act, Rcw chapter 42.56? Requesting access to and a copy of 1.) Any and all records involving cause #17-1-01750-9. 2.) Any and all witness statements. Interrogation video, dash cam videos, voice recording or other recordings involving cause #17-1-01750-9 3.) Any and all communication between police, sheriffs, detectives, investigators, witnesses, victims, and prosecutors via emails, text or phone involving cause #17-1-01750. I your client showed you the form showing the prosecutor office saying there is 608 pgs. of public records which I informed you My assign counsel Mr. Dino Sepe I wanted correct?

- 3.) Upon trial Mr. Sepe did Prosecuting attorney Scott Harloss ever inform you on who his witnesses would be taking the stand?
- 4.) Is there any reason that you Defense Assigned counsel Dino Sepe didn't feel the need to have a witness interview with Ms. Diana Gapke? If knowing she was going to be a witness called to take the stand. Wouldn't you have wanted to interview this witness to get a recorded statement? Mr. Perry never had a chance to even make a defense or question Ms. Gapke on her testimony correct?
- 5.) Mr. Sepe is there any reason why you never used the evidence Mr. Perry family members sent to you showing Ms. Booth conduct, drug use and alcohol use on social media to show that the victim clearly lied to the state about her use of drugs and alcohol?
- 6.) Mr. Sepe why did you feel that Mr. Perry's medical records wasn't relevance in his your clients defense to show he has nerve damage, carpool-tunnel, and Tendinitis in the elbows and hands. Are these not facts for a case of Assault Strangulation Mr. Sepe?

7.) If Defense Counsel didn't agree from the beginning that 404(b) isn't what the Thurston County and Pierce County is then why did you Mr. Sepe agree with the state in The Honorable Judge John R. Hickman court room on July 9th 2019 sir? Pg.6 line 13 of the Verbatim Report of Proceedings on 404-(B).

8.) If issue's was raised to Denfense Counsel during trial about multiple Jury misconduct why didn't you Mr. Sepe to raise those issue's Mr. Perry your client who you work for and represent on behalf of the state of Washington to make sure it was addressed on record?

9.) When you picked the jury Mr. Sepe your client Mr. Perry asked for jury #41 and #44 to be on his jury selection why wasn't this taken into consideration? But instead put jury #6 selection #15 on the jury after she showed emotions in interviews toward sexual misconduct and assault .why is that Mr. Sepe?

10.) My final question for you Mr. Sepe is when was the
3.5 hearing done on behalf of State evidence being
presented in and Defense's evidence that would be
presented in trial?

May you please respond to these question's in
writing Mr. Sepe within the next (10) business days
Sir. Thank you for your time and legal assistance.

Sincerely,

Antoine Joseph Perry

Case # 17-1-01750-9

Dear, Mr. Sepe

8-30-19

I ANTOINE PERRY is writing you on behalf of my trial. In Jury Instruction #3 it states "A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count."

Jury Instruction No. 7 states "A person commits ~~rape~~ the crime rape in the second degree when he or she engages in sexual intercourse with another." How can a person be guilty of rape 2° if he or she never penetrated the vagina? But only gave oral sex and forcible compulsion was never proven by any facts or evidence.

Jury Instruction No. 9 says: Sexual intercourse means that the sexual organ of the male entered and penetrated the sexual organ of the female and occurs upon any penetration, however slight or any penetration of the vagina or anus, however slight, by any object, including a body part, when committed on one person by another, whether such persons are of the same or opposite sex or any act of sexual contact between persons involving sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

How was physical force proven ~~in~~ in this case against T.G.? Force compulsion was never shown so what was the jury convinced by in Instruction NO. 10 for Forcible Compulsion. I feel that we had a duty to object to this Instruction in the verdict due to 404(b). 404(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is "not admissible" to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

I'm address you Mr. Sepe because we had a good case and from your opening statement, to cross-examination, with Ms. Green you failed to ask or have her read her statement. In her interview with Mr. Stewart on pg. 6 lines 22-26 where Ms. Green clearly stated she had a "choice" in this matter. Mr. Sepe in cross-examination you only asked about Ms. Green stating - she felt she had some type of like... responsibility in line 24 of pg. 6 of her interview transcript. Which was clearly proof to show Ms. Green could have left.

If lack of consent was the issue in this case then a verdict should have been a lesser included. State v. Gustavo Duarte Mares 190. Wn.

App. 345; 361 P.3d 158; 2015 Wash. App Lexis 2259.

This would have been your Jury Instruction No. 14 or 15

Also in your Jury Instruction No. 16 as well as your Jury Instruction No. 20 lacks all the elements of Assault 2.

A charging document "is constitutionally adequate only if all essential elements of a crime, statutory and nonstatutory, are included in the document so as to apprise the accused of the charges against him or her and to allow the defendant to prepare a defense." State v. Vangerpen, 125 Wn. 2d 782, 787, 888 P.2d 1177 (1995). This requirement "has long been settled law in Washington and is based on the federal and state constitutions and on court rule."

Vangerpen, 125 Wn. 2d at 786 (footnotes omitted). RCW 10.39.052 (2) also clarifies that an indictment or information must contain "(a) statement of the acts constituting the offense, in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended."

With this letter I will include the elements for
RCW. 9A.36.021 Where there is 10 elements in the
Assault 2 definitions why was only two (2) used
in the Jury Instruction no. 20?

I also wanna bring up the Jury misconduct
and ~~prejudice acts~~ from the way Jury no. 6 looked
emotional about Tehya Green and Cyra Booth
testimonies. I brought her up to you and you
stated this is normal.

Jury no. 8 I told you Mr. Sepe, ~~so~~ that the individual
seem disturbed by Deputy Prosecutor Scott Hartless
opening statement, wasn't good at paying attention,
staring at Defendant (Perry myself), seem sad about the
victims statement at 2:15pm on 7-18-19.

Jury no. 5 seem upset about hearing the allegation,
doesn't want to hear this case due to allegation, The
individual didn't look interested in the case through-
out the whole trial. He never interviewed this jury
and if we would have we would have got a better
feel about his view's toward the type of allegations
that was going to be talked about. This is error and
misconduct.

Jury No. 7 looked uncomfortable hearing the allegations,
Kept giving me (defendant Perry) a glare during trial,
when the state's Medical examiner took the stand
she had a mean glare Mr. Sepe which I confirmed
with you once again on 7-23-19 and once again you
told me this was not Jury Misconduct. How is this
not Jury Misconduct Sir?

Jury No. 3 Keep closing off during the trial and
when I told you Mr. Sepe you never address this
in the trial any reason ~~you~~ why you didn't address
this concern?

Jury No. 5 was stone face to hearing the witness
for 404(b) purposes Ms. Booth from the Thurston County
Case. The jury was never addressed to not use the
witness to get the burden of proof if there was no
evidence to support the alleged charges. Once again
Mr. Sepe you as my assign Counsel never address this
in your closing statement. ~~Not you~~

Jury No. 6 stated in the interview that "he/she doesn't think if a jury experienced past accidents could make her/him fit to judge a case with same accusation. This jury was also emotional about sexual assault issues and as my assign counsel Mr. Sepe you never raised this issue on the record of the pretrial concern of bias jury on our bench. Misconduct wouldn't you say?"

Jury No. 1 told us in the jury interview that he was not good on making decision making. But we allowed him on our jury knowing the prejudice that would come with the individual on our jury.

Jury No. 8 stated in the interview that consent can change to no and that statement alone should have kept him/her off our jury selection Mr. Sepe

I'm raising these issues with you on the grounds of ineffective counsel. With your experience in law for over 30 yrs you should have spoke on my behalf since you told me not to speak on my own behalf when I had a error or issue to raise during trial Sir.

My last concern is the 3.5 hearing. Can you tell me when was it done Mr. Sepe because the only hearing that was done was the motion of Limine for 404(b) being allowed in. Which you clearly agree to in the ruling on pg. 6 of The Verbatim Report of Proceedings Judge's Ruling on 404(B) Motion June 10, 2019 By The Honorable John B. Hickman Dept. 22

Read State v. Dewey, 93 Wn. App. 50, 966 P.2d 414 (1998), a prosecution for rape, the trial court erred in admitting evidence that the defendant had previously raped another women. The court said that although the two rapes took place under similar circumstances, the evidence did not show any unusual scheme or plan that would directly tie the defendant ~~to~~ the present charges. The court expressly disapproved of the more receptive approach to such evidence in Division I.

Also will be a letter from my cellie in Thurston County Tyler Mariex Letter on behalf of my nerve damage to my hands which you never choose to admit into evidence on my behalf Mr. Sepe.

When you have time to address these matter's
I ANTOINE JOSEPH PERRY are addressing
on behalf of my trial sir. Please feel free to
contact me or come talk to me please and
thank you.

By the way I never received all of my
Discovery or public records Act upon my
request to have before my trial started. My you
please send me all of my discorery that
was used in the trial on the case no. 17-1-
01750-9 Please and Thank you Mr. Sepe for
your time and assistance.

Sincerely,
Antoine Perry

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Appeal No. 54165-3-11

Pierce Co. No. 17-1-01750-9

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The Cover letter for grounds on Ineffective
Assign Counsel in the matter of State v.
Perry.

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- Defense counsel never admitted in T.G. interview transcript stating her saying she felt she had a responsibility and had a choice when it came to getting in the backseat with defendant.
- Defense Counsel failed to address or have a defense to how there was no unlawful imprisonment due to victim was able to leave whenever.
- Defense counsel didn't argue the fact that the medical examiner clearly stated nothing happen to T.G. Only that I had DNA around her vagina, anal area clearly from oral sex.
- ineffective counsel was taken place on the ground that defense counsel never wanted to ask T.G. questions on the grounds of her lying about her age. Why she waited this to tell her mother and when TG did she changed what happen. Defense counsel limited his cross-examination where the jury never got to explore the contradicting statements made.
- ineffective counsel on defense counsel for never addressing that both alleged victims addressed defendant asking for favors. Never did the defendant seek them out.
- The judge Hickmen allowed 404(b) in when in the Cyra Booth case in Thurston County was not similar which could have been the rotten seed plated in the favor to get a conviction. State v. Monday (2011)

- Also would like to raise the issue of my jury being all white and one(1) black person which is in line with Rule 8.4 Misconduct (i) Reliance on Conduct:

The following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection in Washington State: allegations that the prospective juror was sleeping, inattentive, or staring or failing to make eye contact; exhibited a problematic attitude, body language, or demeanor; or provided unintelligent or confused answers. [Adopted effective April 24, 2018]

- In my trial notes to my attorney I address multiple jury misconduct from (eye glaring, to sleeping, jury not being inattentive looking away at the distance to a female jury becoming emotional). Assign Counsel told me none of it matter and wouldn't address my concerns of misconduct to the judge.
- In Rule 611(b) states: Cross-examination should be limited to subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion permit inquiry into additional

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matters as if on direct examination. Assign
Counsel refused to do so in this case

- Strickland v Washington - Assigned Counsel was also ineffective counsel on the grounds of client and legal assistant communication. I was not informed on who would all be on the witness list until trial started and jury was being polled. I asked defense counsel why wasn't I informed and was told "cause the individual doesn't matter." which was a witness for the state, who I never got to interview so my 6th Amendment was violated.
- When I asked defense counsel to have victim read her interview statement defense counsel refused stating "we don't want to victimize the witness. Rule 608 (a)(2)(b)(1). Victim told Jury and state Attorney she felt a different age so that the age she said she was. Meaning she wasn't being truthful at time of the incident as well as the story victim told her mother as well. U.S. v. Greer, 806 F.2d 556, 105 Lab. Cas. (CCH) P 12133, 22 Fed. R. End. Serv. 174 (5th Cir. 1986)

- In TG interview with (D)'s investigator Michael Stewart on March 1, 2019 which included prosecutor Scott Hartlass and victim Advocate Amy Mahoney.

On pg.(6) of (13) Transcript of Interview of TG. TG states in line 22 - that she "kinda... not really because ... you always have a choice..."

Then in line 24 TG goes on to say "I... felt like I had some type of like... responsibility because he brought me food."

This issue was brought up to (D) attorney to admit as evidence. Defense Attorney stated "we don't want to victimism the witness. (D) Confrontation Clause of the Sixth Amendment provides that [I]n all criminal prosecutions, the accused shall enjoy the right... to be able to confront witnesses against him/her." U.S. Const. Amend VI

- *Del v. Van Arsdall*, 475 U.S. 673, 684 (1986)
(harmless-error analysis of denial of defendant's right to impeach witness for bias should weigh : "the importance of the witness's testimony in the prosecution's case, whether the testimony was cumulative, the presence of absence of evidence corroborating or contradicting the testimony of the witness on

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cont pg. 5 material points, the extent of cross-examination otherwise permitted, and... the overall strength of the prosecution's case.")

- Defense Attorney refuse to arguing on the (D) defense that the state failed to meet the Unlawful Imprisonment Rcv. 9A.40.040 elements.

The restraint is without consent, This is a essential element of unlawful imprisonment if he or she knowingly restrains another person. State v. Ashley, 186 Wn. 2d 32 (2016)

- Defense Attorney failed to add in defendants sentencing brief the time defendant served in Thurston County jail; which should be (10) months served toward case no. 17-1-01750-9 due to charges filed while defendant was held on unrelated charges. (State v. Lewis 184 Wash. 2d 201 (2015)) Instead of (19) months served defendant should have been credited for (29) months served. This was address to defense counsel by defendant before sentencing. This error is curable by the state.

- Under Art. I § 22 defendant has the right to procure material witness
State v. Williams, 18 Wash 49, 50 P. 580, 1897 (Washington Lexis 103) 1897 IT's ineffective Assistance of Counsel Failure to investigate.
State v. Jones 183 Wn.2d 327 (2013)
- Thus, failure to interview a particular witness can certainly constitute deficient performance ("failure to investigate or interview witness... is a recognized basis upon which a claim of ineffective assistance of counsel may rest.")
Jones v. Wood, 114 F.3d 1002 (9th Cir. 1997) (failure to investigate witnesses called to attention of trial counsel as important constitutes ineffectiveness). It depends on depends on the reason for the trial lawyer's failure to interview.

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Appeal No. 54165-3-II

Pierce Co. No. 17-1-01750-9

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The Cover letter for grounds on Prosecutor Misconduct
in the matter of State v. Perry.

Please take the time to review the issues that
was not address by the Court.

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- Under the exclusionary rule, evidence obtained in violation of the Fourth, Fifth, or Sixth Amendments may not be introduced at trial to prove a defendant guilty. The purpose of the exclusionary rule is to deter constitutional violations. When a court improperly admits evidence in violation of the exclusionary rule, reversal is required unless the error was harmless beyond a reasonable doubt. However, evidence obtained pursuant to a valid search warrant is not rendered inadmissible merely because it was obtained in violation of the "Knock-and-announce" rule.
- In *State v. Salinas*, 119 Wash. 2d 192, 201, 829 P.2d 1068 (1992) Evidence is sufficient to support a conviction if, viewed in the light most favorable to the state, it permits any rational trier of facts to find the essential elements of the crime beyond a reasonable doubt.

So if the medical examiner states witness testifies that she found no proof of Assault or strangulation on the victim, or that (D) dna was in the victim's vagina, but that (D) dna was only outside the vagina area which is proof only oral sex took place how do you still get found guilty of assault with forceable compulsion and unlawful imprisonment with sexual motive and no evidence to support the

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findings of these charges.

- Prosecutor misconduct and ineffective assistance of counsel on the grounds of the state putting enhancements for forcible compulsion and sexual motive to try to get a SVP and a maximum sentence (State v. Fisher, 165 Wn. 2d 727, 757, n.8, 202 P.3d 937 (2009) State v. Allen, 182 Wash. 2d 364, 341 P.3d 268 (2015) (State v. Korum, 120 Wn. App. 686, 86 P.3d 166 (Wash App. 2004))
- Insufficient evidence to support forcible Compulsion or threat of physical harm sufficient to constitute forcible compulsion, requiring reversal of Second degree Rape conviction. (State v. Neisburg, 65 Wn. App. 721, 829 P.2d 252, (1992) Wash App. Lexis 220 / Wash. Ct. App. 1992)
- Prosecutor Never took Rev. 9.94A 835 into consideration before adding the Special Allegation-Sexual Motivation and forceable Compulsion to the charges.
- In the Rev. 9A.40.040 for Unlawful Imprisonment A person is not unlawful imprisonment if they are capable to flee the alleged perpetrator. (State v. Dillon, 163. Wn. App. 101, 257 P.3d 678, 2011 Wash App. Lexis 19115 (Wash. Ct. App. 2011) (State v. Atkins, 130 Wn. App. 395, 123 P.3d 126, 2005 Wash. App. Lexis 2009

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- In RCW 9A.44.050 Rape 2(a) a person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in "Serial intercourse with another person. (a)(b)

Medical testified my DNA was never in the victim vagina and that there was no internal damage showing force or fear.

State v. Coristine, 177 Wn.2d 370, 300 P.3d 400, 2013 Wash. Lexis 415 (Wash 2013)

- Also in the Ruling of Limine Motion on 404(b) the Stand in Judge ruled in favor of the state but failed to see that Pierce County case and Thurston County was two different cases and not similar at all. The facts he came up with was exterior details of the cases and not actual facts or interior. As well judge Hickman wasn't the presiding judge for this case. Judge Jerry Constello was and should have been who ruled on the facts himself. Defense Counsel and myself Objected to this 404(b) ruling.

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- The state prosecutor Scott Harless allowed a witness to lie under oath. Deanna Gapke stated in her testimony that Tohya Green told her "that a man pulled up to her while she was walking the family dog around 6am. The perpetrator allegedly pulled a firearm and told T.G. (v) to get in. T.G. stated she let the lesser go and complied with the alleged perpetrator made her give him oral sex." Conflicting to Tohya Green interview and testimony at trial.

One of the bedrock principals of our democracy "implicit in any concept of ordered liberty," is that the state may not use false evidence to obtain a criminal conviction.

Napue v. Illinois, 360 U.S. 264, 79 S. Ct. 1123, 3 L.Ed. 2d 1217 (1959).

"Deliberate deception of a judge and jury is inconsistent with the rudimentary demands of justice."

Mooney v. Holohan, 294 U.S. 103, 79 L.Ed. 791, 55 S. Ct. 346 (1935) (per curiam). Thus, "a conviction if established, that the government knowingly permitted the introduction of false testimony reversal is "virtually automatic." (*United States v. Hallach*, 935 F.2d 445, 456 (2nd Cir. 1991) (quoting *United States v. Srofsky*, 527 F.2d 237, 243 (2nd Cir. 1975)

• Proving Elements Beyond a Reasonable Doubt. Under Due Process Clause of the fifth Amendment, the prosecutor is required to prove beyond a reasonable doubt every element of the crime with which a defendant is charged. The reasonable doubt requirement applies to elements that distinguish a more serious crime from a less serious one, as well as to those elements that distinguish criminal from noncriminal conduct.

The defendant must also be acquitted if the court defines reasonable doubt in a way that impermissibly eases the prosecution's burden of proof.

However, due process does not require the court to use any particular words to advise the jury of the government's burden of proof as long as, "taken as a whole, the instructions... correctly convey the concept of reasonable doubt to the jury."

Finally, the omission from the jury instructions of any element that the prosecution must prove beyond a reasonable doubt may require reversal of the defendant's conviction.

State v. Salina, 119 Wash. 2d 192, 201, 829 P.2d 1068 (1992)

- In re Winship, 397 U.S. 358, 364 (1970); see also U.S. v. O'Brien, 130 S. Ct. 2169, 2174 (2010) (distinguishing between "[s]entencing factors" and "[e]lements of a crime [that] must be charged in an indictment and proved to a jury beyond a reasonable doubt"). The Winship, reasonable doubt standard applies in both state and federal proceedings. See Sullivan v. Le, 508 U.S. 275, 278 (1993). The standard protects three interests. First, it protects the defendant's liberty interest. See Winship, 397 U.S. at 363.
 - Second, it protects the defendant from the stigma of conviction. Id. Third, it encourages community confidence in criminal law by giving "concrete substance" to the presumption of innocence. Id. at 363-64. In his concurring opinion, Justice Harlan noted that the standard is founded on "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." Id. at 372 (Harlan, J., concurring)
- The doctrine of Corpus delicti protects against convictions based on false confession, requiring evidence of the "Body of the crime." State v. Aten, 130 Wash. 2d 640, 655-57, 927 P.2d 210 (1996)

- The burden of proof consists of two parts: the burden of production and the burden of persuasion. The party bearing the burden of production must produce enough evidence to allow a factfinder to determine that the fact in question occurred. The party who first pleads the existence of a fact not yet in issue usually has the burden of production; that party is subject to an adverse ruling by the court. For instance, the prosecution has the burden of production on every element of the offense charged. If the government fails to produce sufficient evidence for any element, thereby not bringing the fact into issue, the judge may direct a verdict in the defendant's favor. See, generally LAFAYE, Criminal Law § 18 (4th ed. 2003); McCormick, Evidence §§ 336-337 (6th ed. 2006).
- The state failed to prove that the victim mentally incapacitated or physically helpless during the sexual intercourse. *State v. Coristine*, 177 Wn. 2d. 370, 300 P.3d 400, 2013 Wash. Lexis 415 (Wash. 2013)
- See *Phillips v. Woodford*, 267 F.3d 966, 984-85 (9th Cir 2001) (It is well settled that presentation of false evidence violates due process) (citing *Napue*, 360 U.S. at 269)

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- In describing the rule, the United States Supreme Court itself has discussed the use of false evidence, including false testimony. There is nothing in Napue, its predecessors, or its progeny, to suggest that the United States Constitution protects defendants only against the knowingly use of prejured testimony. Due process protects defendants against knowingly use of any false evidence by the state whether it be documents, testimony or any other form of admissible evidence.
- State admitted TG sweat which showed no visible evidence of blood which victim stated she was bleeding heavy.
- State also had victims mother Deana Gapek testify which violated Defendants Sixth Amend. Const. Defendant was not able to put together a defense to what the states witness testified to in trial. State v. Williams, 18 wash 47, 50, P. 580, 1897 (wash. lexis 103) 1897